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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

GUNILLA PERSSON,

Plaintiff and Appellant,

v.

BARRY HERSHEY,

Defendant and Respondent.

B163819

(Super. Ct. No. BC241414)

APPEAL from a judgment of the Superior Court of Los Angeles County. Kenneth R. Freeman, Judge. Affirmed.

Marvin M. Mitchelson for Plaintiff and Appellant.

Keker & Van Nest, Elliot R. Peters and Ethan A. Balogh for Defendant and Respondent.

Gunilla Persson appeals from a judgment entered after the trial court confirmed an arbitration award in favor of Barry Hershey. She contends the trial court erred in upholding several erroneous factual findings and legal conclusions of the arbitrator. This appeal is governed by a narrow standard of review which does not permit this court to review the merits of Persson's claims. Accordingly, we affirm the judgment.

## FACTS AND PROCEEDINGS BELOW

In June 1998, Gunilla Persson sued Barry Hershey for breach of contract, intentional infliction of emotional distress and fraud, among other causes of action. She alleged Hershey breached a March 1996 oral agreement to "provide for all of [her] financial support and needs for the rest of her life" in exchange for her services as "a companion, homemaker, cook, business partner, consultant, social hostess and confidante." She also alleged Hershey caused her emotional distress in or around August 1996 when he "pressure[d]" her to terminate a pregnancy after he learned she was carrying his child. Persson further asserted Hershey breached additional promises he made between October 1996 and December 1997 to pay Persson \$120,000 per year for 18 years "and to maintain his relationship with [her] in consideration for [her] not filing a lawsuit against [him]" for infliction of emotional distress. Persson alleged Hershey had not given her any money since October 1996.

In December 1998, Persson and Hershey settled the above-described lawsuit. Under a confidential settlement agreement, Persson agreed to dismiss her lawsuit with prejudice and Hershey agreed to pay her \$322,500. The agreement includes a release of known and unknown claims by both parties (and their heirs, successors, etc.), and an arbitration clause providing for an award of attorney fees and costs to the prevailing party. Persson agreed she would "not, directly or indirectly, initiate any contact, oral, written, electronic, or visual, or seek to be in the presence of Hershey, his wife, children, or other family members known to Persson for the balance of her natural life." Persson also agreed, if she were to violate certain provisions of the settlement agreement,

including the aforementioned, or “take any action which repudiates, or is inconsistent with,” the settlement agreement, she would forfeit the settlement payment or, if already paid, “be liable for liquidated damages in the amount of \$250,000.”

About two years after the settlement, in December 2000, Persson brought the present action against Hershey for declaratory relief and specific performance of an alleged “Third Party Beneficiary Contract.” Persson sued Hershey in her alleged capacity as constructive trustee for an unborn and unconceived child she referred to as the “Swedish Baby.” Persson asserted she agreed to terminate her pregnancy in August 1996, but only after Hershey promised he would (1) pay the costs associated with an artificial insemination and pregnancy and (2) “establish a Third Party Beneficiary Trust for the ‘Swedish Baby’ funded with sufficient assets in order to generate \$120,000 each year in income . . . to be paid to [Persson] for the benefit and care of the ‘Swedish Baby’ for the first 18 years of its life.” Persson alleged Hershey failed to make good on his promises. Persson asked the trial court to declare the release in the December 1998 settlement agreement did not bar her enforcement of the alleged “Third Party Beneficiary Contract.” She also asked the court to order Hershey “to specifically perform under the terms and conditions of the agreement.”

Hershey filed a petition to compel arbitration of the claims in the present action, citing the arbitration clause in the settlement agreement. Persson opposed the petition, arguing the arbitration clause does not apply because the “prior lawsuit had absolutely nothing to do with the claims pertaining to the ‘Swedish Baby’ or the independent contractual promises by Hershey related thereto.” The trial court granted the petition.

Persson filed a demand for arbitration with the American Arbitration Association, asserting her claims for declaratory relief and specific performance. Hershey filed a counterclaim against Persson, alleging she violated the settlement agreement by, among other things, initiating contact with him and bringing this action after she released all known and unknown claims against him. Hershey sought \$250,000 in liquidated damages and his attorney fees and costs.

The arbitrator bifurcated the proceedings. In Phase I, he considered whether the release in the settlement agreement and/or the two-year statute of limitations for oral contracts bar Persson's claims in the present action. After reviewing the parties' written submissions and exhibits, the arbitrator decided, in pertinent part: "The 1998 Release constitutes a mutual rescission by Persson and Hershey of every contract and/or agreement that had ever arisen between them. [Citation.] And a third person may not enforce a contract made for his benefit after the parties to the contract have rescinded it. [Citation.] As a result, Persson either on her own behalf or on behalf of her 'unconceived child,' could not enforce the alleged contract at any time after she executed the December 1998 Release. . . . [¶] Second, Persson's claims are time-barred pursuant to the two-year statute of limitations for oral contracts set forth in Code of Civil Procedure [section] 339. Persson asserts that Hershey breached the alleged oral contract in October 1996. This action has been brought more than two years later, and as a result is time barred." The arbitrator dismissed Persson's claims.

In Phase II of the proceedings, the arbitrator resolved Hershey's counterclaim. He concluded Persson violated the settlement agreement by contacting Hershey and by pursuing the claims in the present action: "Hershey had paid Persson nearly one third of a million dollars on the understanding that Persson would never 'directly or indirectly' initiate any contact with Hershey again. Persson waited only four months after receiving her final payment under the terms of that agreement before breaking this obligation. The October 6, [2001] demand letter and Persson's continued pursuit of her (now dismissed) claims each constitutes a patent violation of her obligation never to contact Hershey again. Each qualifies as conduct 'inconsistent with th[e] [Settlement] Agreement. . . . [¶] . . . [Moreover, Persson] ignored the arbitration provision of the Settlement Agreement, pursuing in court these very claims- claims that the Arbitrator has found she released and rescinded in the Settlement Agreement- against Hershey. But that is exactly the type of conduct the Settlement Agreement forbade, and for which the Settlement Agreement assessed damages." In accordance with the terms of the settlement agreement, the

arbitrator awarded Hershey \$250,000 in liquidated damages, plus \$84,000 in attorney fees.

Hershey filed a petition to confirm the arbitration award. Persson opposed the petition, arguing the arbitrator exceeded his power and authority in applying the release because the settlement agreement “did not include any causes of action” asserted in this lawsuit. She also argued the arbitrator “failed to properly consider all of the facts before [him]” and his award “is unreasoned.” Finally, she argued the arbitrator erred in awarding damages to Hershey because she did not violate the settlement agreement. The trial court granted the petition, dismissed Persson’s claims and entered judgment in favor of Hershey in the amount of \$339,750.

## DISCUSSION

Persson contends the trial court erred in upholding several erroneous factual findings and legal conclusions of the arbitrator, specifically (1) “the contractually created rights of the ‘Swedish Baby’ were somehow included in the December 1998 Release pertaining to Persson’s palimony lawsuit,” (2) Persson’s claims are barred by the statute of limitations, and (3) Persson is liable to Hershey for liquidated damages because she violated the settlement agreement. In response, Hershey argues this court may not “review the arbitrator’s decision for factual and legal errors.”

“To ensure that an arbitrator’s decision is the end of the dispute, arbitration awards are subject to very narrow judicial review.”<sup>1</sup> On appeal from a judgment confirming an award “we cannot review the merits of the controversy, the arbitrator’s reasoning, or the sufficiency of the evidence supporting the award.”<sup>2</sup> “Further, the existence of an error of

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<sup>1</sup> *A.M. Classic Construction, Inc. v. Tri-Build Development Company* (1999) 70 Cal.App.4th 1470, 1474-1475.

<sup>2</sup> *Pierotti v. Torian* (2000) 81 Cal.App.4th 17, 23.

law apparent on the face of the award that causes substantial injustice does not provide grounds for judicial review.”<sup>3</sup> An error of fact is not reviewable either.<sup>4</sup>

“[T]he exclusive grounds for vacating an arbitration award are the . . . statutory grounds found in Code of Civil Procedure section 1286.2.”<sup>5</sup> Under this section, a “court shall vacate the award if the court determines any of the following: [¶] (1) The award was procured by corruption, fraud or other undue means. [¶] (2) There was corruption in any of the arbitrators. [¶] (3) The rights of the party were substantially prejudiced by misconduct of a neutral arbitrator. [¶] (4) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted. [¶] (5) The rights of the party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct of the arbitrators contrary to the provisions of this title. [¶] (6) An arbitrator making the award either: (A) failed to disclose within the time required for disclosure a ground for disqualification of which the arbitrator was then aware; or (B) was subject to disqualification upon grounds specified in Section 1281.91 but failed upon receipt of timely demand to disqualify himself or herself as required by that provision.”<sup>6</sup>

We review an arbitration award deferentially, drawing every reasonable inference in support of the award.<sup>7</sup> We review the trial court’s decision confirming the award de novo.<sup>8</sup>

In asserting her claims on appeal, Persson completely disregards the applicable standard of review. As Hershey points out, Persson fails to invoke any of the statutory

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<sup>3</sup> *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 33.

<sup>4</sup> *Harris v. Sandro* (2002) 96 Cal.App.4th 1310, 1313.

<sup>5</sup> *Marsch v. Williams* (1994) 23 Cal.App.4th 238, 243.

<sup>6</sup> Code of Civil Procedure section 1286.2, subdivision (a).

<sup>7</sup> *Pierotti v. Torian, supra*, 81 Cal.App.4th at page 24.

<sup>8</sup> *Advanced Micro Devices, Inc. v. Intel Corporation* (1994) 9 Cal.4th 362, 376, footnote 9.

grounds for vacating an arbitration award. Instead, she bases her appeal entirely on her contentions the arbitrator made factual and legal errors in rendering his award. As discussed above, the narrow standard of review applicable to arbitration awards does not permit this court to “review the merits of the controversy, the arbitrator’s reasoning, or the sufficiency of the evidence supporting the award.”<sup>9</sup> Nor does it permit us to review errors of fact or law, no matter how glaring.<sup>10</sup> Accordingly, we agree with Hershey’s position Persson has asserted no claims on appeal which this court may review.

Below, Persson did make a feeble attempt to invoke one of the statutory grounds for vacating an arbitration award. In opposing Hershey’s petition to confirm the award, she argued the arbitrator exceeded his power and authority in applying the release because the settlement agreement “did not include any causes of action” asserted in this lawsuit. This is just another way of saying the arbitrator erred in applying the release. An arbitrator does not exceed his power or authority by making a factual or legal error. “So long as an arbitrator has . . . the power and authority to decide [an] issue, his decision thereon cannot exceed his powers within the meaning of section 1286.2, subdivision (d) [now subdivision (a)(4)].”<sup>11</sup> There is no doubt the arbitrator in this case had the authority to decide Persson’s declaratory relief claim, Hershey’s statute of limitations defense and Hershey’s counterclaim. Any errors he may have made in resolving these issues are not subject to judicial review.

Based on the foregoing, it is clear the trial court properly confirmed the arbitration award.

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<sup>9</sup> *Pierotti v. Torian*, *supra*, 81 Cal.App.4th at page 23.

<sup>10</sup> *Moncharsh v. Heily & Blase*, *supra*, 3 Cal.4th at page 33; *Harris v. Sandro*, *supra*, 96 Cal.App.4th at page 1313.

<sup>11</sup> *Creative Plastering, Inc. v. Hedley Builders, Inc.* (1993) 19 Cal.App.4th 1662, 1666.

## DISPOSITION

The judgment is affirmed. Respondent is entitled to recover his costs on appeal.

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JOHNSON, Acting P.J.

We concur:

WOODS, J.

MUNOZ (AURELIO), J.<sup>\*</sup>

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<sup>\*</sup> Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.